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THE (FINAL) ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA): RUTHLESS OR TOOTHLESS?

TAMMY WILSON COWART^{*}

I. INTRODUCTION

Secret meetings. Leaked Documents. Freedom of Information Act lawsuits. These and other issues have plagued discussions of the Anti-Counterfeiting Trade Agreement (ACTA) since news of it hit the media three years ago. The U.S. Trade Representative (USTR), an office of the Executive branch, has negotiated the agreement with many developed countries, including Australia, Canada, the European Union, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, and Switzerland.¹ The USTR describes the goal of ACTA as working “with trading partners in favor of strong IPR enforcement to achieve an agreement that raises the international standard for the enforcement of IPR.”² Although most of the discussions between the ACTA parties were secret, the Obama Administration released the preliminary draft of the ACTA on April 21, 2010 after much public pressure. The final draft of ACTA was released October 2, 2010.

In early 2010, a draft of ACTA from the seventh round of negotiations held in January in Mexico was leaked over the internet. The January leaked draft proved instructive because it contains the name of parties proposing or agreeing to each provision. Thus, one can glean which countries appear to be pursuing various provisions, often controversial, in ACTA by examining the

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¹ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, CONSOLIDATED TEXT (Oct. 2, 2010), <http://www.ustr.gov/acta> (hereinafter OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Oct. Text). More specifically, Australia, Austria, Belgium Bulgaria, Canada, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malta, Mexico, Morocco, the Netherlands, New Zealand, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and the United States are parties to the agreement.

² OFFICE OF THE U.S. TRADE REP., 2010 SPECIAL 301 REPORT at 11 (2010), http://www.ustr.gov/webfm_send/1906. It is notable that the “BRIC” countries – Brazil, Russia, India and China and not parties to the ACTA; in fact, India and China have been critical of ACTA. Likewise, Russia, India and China have remained on the Priority Watch List in the USTR Special 301 Report for not providing adequate IPR protection or enforcement. ACTA would have no effect on these countries.

leaked January draft. When the April draft was released by the Obama Administration and partner countries, the references to countries was omitted. The April draft does note, by bracketed text, the specific provisions that were still under negotiation by the parties.³ The final draft also omits all references and contains only minor notations of disputed provisions.

By examining the leaked January draft, along with the two publicly released drafts of ACTA, one can begin to interpret the intentions and interests of the parties to the ACTA negotiations. This paper will discuss several provisions of ACTA and its intersection with U. S. copyright law. Section II will discuss general provisions of copyright law, section III will address the various international intellectual property law treaties, and section IV will discuss three main areas addressed by ACTA: criminal liability, internet service providers, and technological protection measures. Section IV will also discuss how these areas conflict with or advance U.S. copyright law.

II. COPYRIGHT LAW BASICS

A. Constitutional Provision

Congress passed the first Copyright Act in 1790; however, the modified Copyright Act of 1976 (Copyright Act) is considered the modern basis for copyright law in the United States. Section 102 of the Copyright Act states that copyright protection is found in “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁴ Among other rights, copyright owners are granted the exclusive right to reproduce copyrighted works, distribute copies to the public, and display the copyrighted work publicly.⁵ Anyone who uses, or authorizes the use of, copyrighted works without the permission of the copyright holder has infringed on the copyright, commonly known as direct infringement.⁶

³ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Oct. Text, *supra* note 1.

⁴ Copyright Act of 1976, 17 USC §102(a) (1976).

⁵ *Id.* at §106.

⁶ *Id.* at §501(a). (There are certain exceptions to infringement, including fair use).

B. Legislative and Judicial Provisions

In addition to statutory direct infringement, the Courts have judicially expanded copyright protection over the years through contributory and vicarious liability, also known as secondary liability. Contributory infringement occurs when one intentionally induces or encourages direct infringement, either by personal conduct that furthers the infringement or providing the means to infringe.⁷ Vicarious liability occurs when one profits from direct infringement while declining to stop or limit the infringement.⁸ Notably, neither intent nor knowledge of infringement is required with vicarious copyright liability.

This expansion was greatly affected by the U.S. Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*, where the Supreme Court adopted the "staple article of commerce" doctrine from patent law in determining whether Sony's sale of the Betamax recorder constituted contributory copyright infringement.⁹ The court found that Sony was not liable for contributory infringement since its Betamax was capable of substantial non-infringing uses.¹⁰ This ruling created a well-known "safe harbor" defense for companies upon a showing that a new technology has legitimate purposes, even though it can also be used to commit copyright infringement.

Then along came Napster. This peer-to-peer file sharing system provided software to users that allowed them to download and exchange MP3 music files. Napster maintained a central server which indexed all of the files available from other users. Users could also search the indexes for music they wished to download. When major music companies filed suit against Napster, the Ninth Circuit Court of Appeals seemed to have little difficulty deciding that Napster had committed contributory copyright infringement.¹¹ The Court relied primarily on Napster's knowledge of the infringement based on internal emails and notices provided by the Recording Industry Association of America (RIAA).¹² The Court further found that the centralized servers provided the means to infringe on the Plaintiff's copyrights, thus nailing the coffin shut on Napster.

The next wave of peer-to-peer systems utilized decentralized servers – these were true peer-to-peer systems – which theoretically would escape the

⁷ *Gershwin Pub. Corp. v. Columbia Artists Mgmt. Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

⁸ *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster*, 545 U.S. 913, 930 (2005).

⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 440 (1984).

¹⁰ *Id.*

¹¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

¹² Darrin Henning, *The Big Chill: The Supreme Court Adopts an Inducement Standard for Third-Party Copyright Infringement Liability, Leaving Innovation in the Cold*, 29 U. ARK. LITTLE ROCK L. REV. 165, 189 (2007).

“means to infringe” problems created by Napster. These systems allowed users to download the software necessary to connect to other peers; however, the software distributor (Grokster, StreamCast, eDonkey) did not maintain any information on a central server. Ultimately, the major record labels, organized by the RIAA, would pursue these companies as well.

In 2001, the U.S. Supreme Court decided the case of *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, not based on vicarious or contributory infringement, but by adding an additional theory of liability from common law – the inducement rule. The Court held that one is liable for secondary infringement, under the inducement theory, for distributing a device “with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps.”¹³

The facts in this case showed that Grokster and StreamCast distributed free software to users after the courts effectively shut down Napster. Evidence was introduced at trial that both companies encouraged users to download copyrighted works and that they were aware a majority of their users were using the software for copyright infringement.¹⁴ Even though the software was free, both Grokster and StreamCast sold space to advertisers. These ads were streamed to users while the software was employed, while revenue increased with each additional user.¹⁵ Furthermore, StreamCast and Grokster made no effort to filter or impede the downloading of copyrighted material, and there was evidence of infringement “on a gigantic scale.”¹⁶ All of these factors provided the Court with ample evidence that StreamCast and Grokster intended to profit from third-party acts of infringement in violation of the Copyright Act. The Supreme Court determined that the Ninth Circuit had misapplied the *Sony* case in its opinion below, but declined to address the holding in *Sony*, and its safe-harbor provision, any further.¹⁷ This decidedly leaves open the question of how *Sony*’s safe-harbor provision would apply in a case involving current peer-to-peer software like BitTorrent or others.

C. Litigation

The Motion Picture Association of America (MPAA) and RIAA have been busy the past few years filing suits against individual copyright infringers; there is, after all, no safe harbor defense for direct infringement.

¹³ *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster*, 545 U.S. 913, 919 (2005).

¹⁴ *Id.* at 923-24.

¹⁵ *Id.* at 926.

¹⁶ *Id.* at 939-40.

¹⁷ Leaving “further consideration of the Sony rule for a day when that may be required.” *Id.* at 934.

In fact, NPR reports that record companies have filed over 26,000 lawsuits for illegal file sharing since 2003.¹⁸ In the *Jammie Thomas* case, the first illegal downloading case to get to a jury verdict, the court ordered Thomas, a single mother, to pay \$222,000 in criminal sanctions for dozens of songs downloaded using Kazaa.¹⁹ She was granted a new trial, however, and on re-trial in June of 2009, the jury found her liable for willfully infringing all 24 copyrights at issue in the case, awarding the record labels \$1.92 million in damages.²⁰ On a motion for new trial and remittitur, the judge reduced the damage award to \$54,000, or three times the statutory minimum per sound recording infringed.²¹

Still other cases involved university students' use of file-sharing programs to download illegal music and movie files. The RIAA was particularly successful in litigating these cases, extracting settlements in most of them ranging from a few thousand to hundreds of thousands of dollars.²² However, the music industry announced in 2008 that it would abandon the practice of filing suit against large number of individual users, opting instead to work with Internet Service Providers (ISPs) to control illegal downloading.²³ Many say the strategy did not stop illegal downloading and tarnished an already negative image for the music labels.²⁴

In addition to the *Jammie Thomas* case, there have been criminal cases in the United States resulting in jail time for copyright infringement. For example, Grant T. Stanley of Wise, Virginia "was sentenced to five months in prison to be followed by five months of home detention for his role in a BitTorrent peer-to-peer network."²⁵

Even though the use of peer-to-peer file sharing networks to download copyrighted material is risky business for individual users, the RIAA and

¹⁸ National Public Radio, *Minn. Woman to Pay for Illegal Music Downloads*, Aug. 5, 2007, <http://www.npr.org/templates/story/story.php?storyId=15037223>.

¹⁹ *Id.* The judge granted a new trial based on the jury instruction that "making available" copyrighted material constituted distribution. See Mark Hefflinger, *Judge Hints at Mistrial in Jammie Thomas File-Sharing Case*, DIGITAL MEDIA WIRE (Aug. 8, 2008), <http://www.dmwmedia.com/news/2008/08/05/judge-hints-mistrial-jammie-thomas-file-sharing-cases>.

²⁰ *Capitol Records, Inc. v. Jammie Thomas-Rasset*, 680 F.Supp. 2d 1045, 1049 (D.C. Minn. 2010).

²¹ *Id.* at 1061. The court's analysis and rationale of using a multiplier of three is interesting but beyond the scope of this paper.

²² Electronic Frontier Foundation, *RIAA v. The People: Five Years Later*, Sept. 2008, <http://www.eff.org/wp/riaa-v-people-years-later#3>.

²³ Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

²⁴ *Id.*

²⁵ Heidi Coy, *Wise, Virginia Man Sentenced in Peer-To-Peer Piracy Crackdown*, Oct. 17, 2006, Press Release, U.S. Attorney's Office, Western Dist. of Virginia, <http://www.cybercrime.gov/stanleySent.htm>.

MPAA's prospect of litigating these cases appears to be doing little to stem the tide of illegal downloads worldwide. This is evidenced by the RIAA and MPAA's recent push to stop illegal downloading from torrent trackers through international political channels.

III. INTERNATIONAL TREATIES AND OTHER ACTIONS

There are three primary international treaties governing copyright law: the Berne Convention for the Protection of Literary and Artistic Rights, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the World Intellectual Property Organization Copyright Treaty of 1996 (WCT). The Berne Convention made copyright protection available for nationals of member states, regardless of whether the work is published.²⁶ The WCT upgrades the level of protection provided in the Berne Convention. TRIPS is the World Trade Organization's (WTO) agreement on intellectual property. Interestingly, the Berne Convention, Article 20 allows member countries to enter into special agreements among themselves as long as they grant more rights than those provided by the Berne Convention.²⁷

IV. ACTA

Perhaps this is what the Office of the United States Trade Representative was thinking of when it, along with other nations, proposed a new global standard for intellectual property rights enforcement under the Anti-Counterfeiting Trade Agreement (ACTA). The plans for ACTA were discussed at the G8 meeting in Germany in 2007, and announced in general terms by then U.S. Trade Ambassador Susan Schwab in October, 2007.²⁸ A Discussion Paper, provided to several Intellectual Property lobbyists and posted on Wikileaks, cited piracy as a "threat to the sustainable development of the world economy."²⁹ The paper encouraged cooperation with international law enforcement groups regardless of where the copyright owner or the infringer is located, an obvious nod to the interests of the copyright owners.³⁰

²⁶ Roberto Barbosa, *Revisiting International Copyright Law*, 8 BARRY L. REV. 43, 47 (2007).

²⁷ *Id.* at 59.

²⁸ Wikileaks, *Proposed U.S. ACTA Multi-Lateral Intellectual Property Trade Agreement*, http://wikileaks.org/wiki/Proposed_US_ACTA_plurilateral_intellectual_property_trade_agreement%282007%29, (last visited July 31, 2010).

²⁹ Wikileaks, *Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement*, http://file.sunshinepress.org:54445/acta_proposal_2007 (last visited July 31, 2010).

³⁰ *Id.*

The topic was also discussed at the G8 meeting in Japan in July, 2008. The G8 Summit website release stated that the member nations will accelerate the establishment of a “new international legal framework, the Anti-Counterfeiting Trade Agreement (ACTA), and seek to complete the negotiation by the end of this year.”³¹ The European Union published a report just before the 2008 G8 summit titled “The Fight against Counterfeiting and Piracy in the Bilateral Trade Agreements of the EU.”³² The EU report cited the goal of creating a higher level of enforcement that countries could join on a voluntary basis. However, even the EU report expressed some concern that ACTA could criminalize non-commercial copyright infringement.³³

Further insight into the mindset of the U.S. government regarding intellectual property right (IPR) issues can be gained from examining the Special 301 Reports of USTR, an annual review of IPR protection and enforcement in seventy-eight countries.³⁴ The 2008 Report specifically referred to ACTA as a “leadership effort among countries that will raise the international standard for IPR enforcement to address today’s challenges of counterfeiting and piracy.”³⁵ The 2008 Special 301 Report also discussed the membership increase in the WIPO treaties. Once the EU Countries join, WIPO will then, according to the Report, represent “a majority world community view” such that other treaties and agreements, including TRIPS, should be “supplemented to eliminate any remaining gaps in copyright protection on the Internet.”³⁶ Furthermore, the United States incorporates the WIPO treaties’ standards in its bilateral and regional trade agreements, and seeks “accession to those treaties as a substantive obligation under these agreements.”³⁷

Even though the USTR had acknowledged, since 2007, that it was involved in plurilateral trade negotiations with other countries over the provisions of ACTA, it declined to release the text of ACTA to the public because of the need for secrecy in trade negotiations. But finally, after two years of public demand for information on ACTA, various leaks of

³¹ Press Release, G8 Declaration on the World Economy, Hokkaido Toyako Summit, July 9, 2008, available at <http://ipjustice.org/wp/2008/07/09/g8-declaration-on-the-world-economy/>.

³² Duncan Matthews, *The Fight against Counterfeiting and Piracy in the Bilateral Trade Agreements of the EU*, European Parliament Briefing Paper for Committee on International Trade, June 26, 2008, <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>.

³³ *Id.*

³⁴ OFFICE OF THE U.S. TRADE REP., SPECIAL 301 REPORT, 2008, http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

information, and a Freedom of Information Act lawsuit,³⁸ the USTR released the draft text of ACTA to the public on April 21, 2010.³⁹ While the countries that participated in the negotiations unanimously agreed to release the draft text to the public, the April draft showed that much of the language in the agreement was still under debate. However, a little over five months later, the ACTA parties released the final Consolidated Text of the ACTA on October 2, 2010.⁴⁰ While there are a number of controversial issues regarding the ACTA, the remainder of the paper will examine three issues addressed in the ACTA and compare the force and effect of those provisions to existing treaties and U.S. law.⁴¹

A. Criminal Infringement

One topic of concern within ACTA is the international definition of piracy that would be subject to criminal penalty. There was initial concern that ACTA would circumvent the TRIPS standard for criminal copyright infringement, which is based on willful infringement on a commercial scale.⁴² In fact, a Discussion Paper on ACTA notably omitted the “willful” requirement with regard to commercial scale infringement.⁴³

³⁸ Grant Gross, *EFF, Public Knowledge Sue US Gov't Over Secret IP Pact*, TECHWORLD, Sept. 19, 2008.

http://www.techworld.com.au/article/260892/eff_public_knowledge_sue_us_gov_t_over_secret_ip_pact. The suit was later dropped when the Obama Administration claimed that the ACTA negotiations were covered as a state secret. See Mike Masnick, *EFF, Public Knowledge Drop ACTA Lawsuit, Realizing “National Secrets” Claim will Block Them*, TECHDIRT (Jun. 18, 2009) <http://www.techdirt.com/article.php?id=20090617/1918145270>.

³⁹ Press Release, Office of the U.S. Trade Representative, The Office of the U.S. Trade Representative Releases Draft Text of ACTA (Apr. 21, 2010), <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/office-us-trade-representative-releases-draft-text-a>.

⁴⁰ There is some speculation that the U.S. Chamber of Commerce pushed for conclusion of negotiations before the end of the year, or that President Obama wanted the final draft released before mid-term elections in November. See Kaitlin Mara, *Civil Society Fights for Participation as ACTA Counter to WIPO Rises*, INTELLECTUAL PROPERTY WATCH, Sept. 24, 2010, <http://www.ip-watch.org/weblog/2010/09/24/civil-society-fights-for-participation-as-acta-counterpoint-to-wipo-rises/>.

⁴¹ A leaked draft of the ACTA dated January, 2010 did reference the name of the countries proposing particular provisions. Reference will be made of both the leaked version and the public version for the remainder of the paper to note the country likely responsible for proposing a particular provision only.

⁴² TRIPS requires criminal procedures and penalties “to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.” See Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 61, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (hereinafter TRIPS).

⁴³ See Margot Kaminski, *Recent Development: The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT’L L. 247, 252-53 (2009).

The April draft of ACTA, however, did require criminal penalties to be applied “at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.”⁴⁴ Willful piracy on a commercial scale is then defined to include: A) significant willful copyright or related rights infringement that have no direct or indirect motivation of financial gain; and B) willful copyright or related rights infringements for purposes of commercial advantage or financial gain.⁴⁵ Financial gain was defined as the “receipt or expectation of anything of value.”⁴⁶ This appeared to push other ACTA parties toward the U.S. standard of criminal copyright infringement. It has been argued that these provisions allow one to be held liable for international criminal sanctions for large-scale copyright infringement even though the alleged infringer does so for “private” purposes.⁴⁷ This requirement of criminal penalties for copyright infringement would go further than TRIPS, which only requires criminal penalties for “willful trademark counterfeiting or copyright piracy on a commercial scale.”⁴⁸

We can assume that this provision addressed some of the legal issues encountered by the RIAA, MPAA, and other copyright owners in combating the peer-to-peer file sharing networks. In fact, it was called the Pirate-Bay-killer proposal by some because of its potential to shut down peer-to-peer and torrent sites such as Pirate Bay that do not generate revenue nor have servers within the United States. While these trade groups have had some success against individual companies with civil and sometimes criminal sanctions, this provision in the April ACTA draft would give them additional firepower for their arsenal.⁴⁹

The April draft of ACTA also contained a proposal which would require criminal sanctions for “inciting, aiding and abetting” willful trademark, copyright, or related rights piracy.⁵⁰ This provision was a European Union proposal according to the January leaked draft⁵¹ and has no basis in U.S. law.

⁴⁴ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, PUBLIC PREDECISIONAL/DELIBERATIVE DRAFT (Apr. 2010) at Art. 2.14, <http://www.ustr.gov/acta> (hereinafter OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, APR. DRAFT).

⁴⁵ *Id.*

⁴⁶ *Id.* at note 37.

⁴⁷ Kaminski, *supra* note 43, at 253. It is notable that the U.S. and Japan proposed inclusion of “private financial gain” in the leaked draft of ACTA, but the word “private” was stricken from the public draft.

⁴⁸ TRIPS, *supra* note 42, at Art. 61.

⁴⁹ One wonders how this might play out with another Jammie Thomas-type defendant on an international stage.

⁵⁰ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44, at Art. 2.15(2).

⁵¹ ANTI-COUNTERFEITING TRADE AGREEMENT, Art. 2.15(2), Informal

In 2007, the European Parliament adopted the EU Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights, creating criminal liability for persons who incite copyright infringement.⁵² The European Union text treats “aiding or abetting and inciting the actual infringement” as intentional infringement subject to criminal penalties.⁵³ After the European Parliament adopted the Directive, the European Economic and Social Committee (EESC) issued its opinion of the Directive, noting “incitement to commit a crime can only be established if the inciter supplies the tools for the specific purpose of committing the crime.”⁵⁴ The EESC was also concerned that merely offering access to the Internet or providing widely used materials could not constitute criminal incitement.⁵⁵

Since there was no definition of “incite” in the April draft of ACTA or in the EU Directive and no precedent in the U.S. legal system, EU analysis would be relevant to how such a provision would be applied or interpreted. If this standard were adopted for criminal copyright infringement, it could extend secondary copyright infringement for software developers, device manufacturers, or ISPs.

The final October text of ACTA seems to have resolved these issues. It now provides that each country provide criminal penalties in “cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.”⁵⁶ This standard is consistent with the criminal

Predecisional/Deliberative Draft: January 18, 2010,
http://www.laquadrature.net/files/201001_acta.pdf (hereinafter ANTI-COUNTERFEITING TRADE AGREEMENT, Jan. Draft). A Dutch judge recently order BitTorrent search engine Mininova to purge all copyrighted content from its site because Mininova was “inciting copyright infringement in others” and profiting through ad sales. See Nate Anderson, *Mininova Ordered to Purge All Links to Copyrighted Files*, ARSTECHNICA (Aug. 26, 2009), <http://arstechnica.com/tech-policy/news/2009/08/mininova-ordered-to-purge-all-links-to-copyrighted-files.ars>.

⁵² Lynda J. Oswald, *International Issues in Secondary Liability for Intellectual Property Rights Infringement*, 45 AM. BUS. L. J. 247, 273 (2008).

⁵³ *Amended Proposal for a Directive of the European Parliament and of the Council on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights*, EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION, COM (2006)0168-C6-0233/2005-2005/0127(COD) (Apr. 25, 2007), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0145&format=XML&language=EN#BKMD-12>

⁵⁴ Opinion of the European Economic and Social Committee on the ‘Proposal for a European Parliament and Council Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights’, EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, COM (2005) 276 final (July 12, 2007), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:256:0003:0007:EN:PDF>

⁵⁵ *Id.*

⁵⁶ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Oct. Text, *supra* note 1, at Art. 2.14(1). Commercial scale would include activity for direct or indirect

infringement standard found in TRIPS.⁵⁷ The same section also requires parties to include criminal liability for aiding and abetting, but there is no longer any reference to incitement in the agreement.⁵⁸ This certainly is a disappointing outcome for copyright owners, particularly the music and movie companies, in their efforts to shut down the peer-to-peer and torrent sites in foreign countries which offer file sharing software to users.

B. ISP Responsibility

Another hotly debated provision under the Criminal Liability section of ACTA is the provision that requires each party to establish liability for “legal persons,” which would include ISPs.⁵⁹ Several proposals were made in the earlier drafts of ACTA with regard to third party liability. The April draft of ACTA required remedies, limitations, exceptions, and defenses for third party legal liability.⁶⁰ Most notable was the footnote definition of third party liability, which stated “liability for any person who authorizes for a direct financial benefit, induces through or by conduct directed to promoting infringement, or knowingly and materially aids any act of copyright or related rights infringement by another.”⁶¹

If one looks more closely at the language proposed in the April draft, particularly footnote 47, several issues bear further reflection and discussion. Footnote 47 purports to extend liability on three different bases. First, third party liability applies to any person who “authorizes for a direct financial benefit...any act of copyright or related rights infringement.”⁶² This essentially adopts a vicarious liability theory of copyright infringement, which imposes liability when the defendant “profits directly from the infringement and has a right and ability to supervise the direct infringer.”⁶³

Second, the April draft states in footnote 47 that third party liability applies for any person who “induces through or by conduct directed to promoting infringement...aids any act of copyright or related rights

economic or commercial advantage.

⁵⁷ TRIPS, *supra* note 42, at Art. 61.

⁵⁸ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Oct. Text, *supra* note 1, at Art. 2.14(4).

⁵⁹ *Id.* at Art. 2.14(5).

⁶⁰ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44, at Art. 2.18 (3).

⁶¹ *Id.* at note 47.

⁶² *Id.*

⁶³ Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, 545 U.S. 913, 931 n.9 (2005). (citing Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963)). MGM argued for vicarious liability in the Grokster case, but the U.S. Supreme Court declined to address Grokster, et al liability under vicarious liability because it decided the case based on inducement theory.

infringement.”⁶⁴ This seems to adopt the theory of inducement of copyright infringement adopted by the U.S. Supreme Court in *MGM v. Grokster*.⁶⁵ In this well known case, the Supreme Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement is liable for the resulting acts of infringement by third parties.”⁶⁶ Ironically, the majority opinion goes on to state that inducement theory “premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”⁶⁷

Third, footnote 47 states that third party liability applies to one who “knowingly and materially aids any act of copyright or related rights infringement.”⁶⁸ This option adopts a theory of contributory infringement, which applies when defendants have knowledge of copyright infringement by third parties.⁶⁹

The footnote goes on to reference “consideration of exceptions or limitation to exclusive rights...including fair use, fair dealing, or their equivalents.”⁷⁰ Other paragraphs in Option one and Option two of this section are carefully crafted to include exceptions for third party liability in cases where the provider does not have actual knowledge of the infringement⁷¹, or where the provider has taken expeditious action to remove or disable access to the infringing activity.⁷² Noticeably absent from this section is any language based on the “staple item of commerce” doctrine, known generally as the Sony safe-harbor doctrine.⁷³ The Sony safe-harbor doctrine is a defense to contributory copyright infringement when the

⁶⁴ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44.

⁶⁵ *Grokster*, 545 U.S. at 936-37.

⁶⁶ *Id.*

⁶⁷ *Id.* at 937.

⁶⁸ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44, at footnote 47.

⁶⁹ *Perfect 10, Inc. v. Amazon.com*, 487 F.3d 701, 729 (9th Cir. 2007). The Supreme Court left the question of contributory infringement largely untouched in *Grokster* (“We do not revisit Sony further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur.” *Grokster* at 934.) Thus, the Ninth Circuit in *Perfect 10* found that the Supreme Court in *Grokster* defined two categories of contributory liability: one based on encouraging or inducing infringement through specific acts and the second on distributing a product that is not capable of substantial noninfringing uses. *Perfect 10*, 487 F.3d at 727.

⁷⁰ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44, at footnote 47.

⁷¹ *Id.* at Art. 2.18 (3)(Option 1).

⁷² *Id.* at (Option 2).

⁷³ Henning, *supra* note 12, at 185.

defendant can show that the product at issue is capable of “substantial noninfringing uses” or “commercially significant noninfringing uses.”⁷⁴ Although this part of the April draft certainly incorporates other U.S. theories of secondary copyright infringement, it specifically declines to incorporate the Sony safe-harbor provision. However, it does appear that this draft is designed to take the full power of the secondary copyright infringement theory adopted by the U.S. Supreme Court, and other lower courts, and extend that into the legal domain of many of our trading partners.⁷⁵ Thus, copyright owners were perhaps hoping to accomplish in one fell swoop what *Napster*, *Grokster*, the Berne Convention, WIPO, and TRIPS could not – seamless imposition of liability for secondary copyright infringement on an international scale.

In a profound reversal of direction, however, the final text of ACTA completely eliminated all references to third party liability. Article 2.18 instead merely requires that each party provide enforcement procedures to permit effective action against infringement with an effective deterrent to further infringement.⁷⁶ This must be perceived as a defeat for copyright owners who were hoping for a legal imposition of U.S.-like third party liability.

Another important issue covered in ACTA addresses the obligation of ISPs to disclose customer information. For several years, trade groups, like the RIAA and MPAA, would file lawsuits against users, requiring ISPs to disclose the identities of customers engaging in file sharing.⁷⁷ As stated earlier, the RIAA abandoned this approach in 2008 and began pursuing agreements with ISPs that allowed the ISP to forward an email to the customer requesting that they stop uploading illegal content.⁷⁸ It is unknown whether the practice has worked to the satisfaction of the RIAA.

With regard to ISP responsibility, the April draft of ACTA provided two options. Option one required an ISP or Online Service Provider (OSP) to “expeditiously” remove or disable access to material upon receipt of legally sufficient notice of infringement or order from a competent authority.⁷⁹ This

⁷⁴ *Id.*

⁷⁵ We must assume that this provision also addresses much of the frustration the MPAA/RIAA encountered when they attempted to sue and shut down many of the torrent websites which were commonly used internationally for copyright infringing activity. Historically, the MPAA and RIAA have had mixed success in shutting down these sites, largely based on the varying degrees of copyright infringement protections in various countries. See McBride, *supra* note 23.

⁷⁶ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Oct. Text, *supra* note 1, at Art. 2.18(1).

⁷⁷ McBride, *supra* note 23.

⁷⁸ *Id.*

⁷⁹ According to the leaked ACTA draft, the U.S. proposed the language “legally sufficient notice of alleged infringement,” while Mexico proposed the language “order from a competent

seems to mirror the Digital Millennium Copyright Act (DMCA) “notice and take-down” provisions.⁸⁰ The DMCA provides that an ISP will not be held liable for copyright infringement if the ISP “acts expeditiously to remove, or disable access to” infringing material upon written communication signed by the rights holder which: (1) identifies the copyrighted work claimed to have been infringed; (2) identifies the material claimed to be infringing with location information; (3) gives contact information for the rights holder and affirmation of the correctness of the complaint.⁸¹

In addition, Article 2.18 (Option two)(3*ter*) in the April draft of ACTA goes further by allowing a rights holder to expeditiously obtain the identity of a subscriber from an ISP/OSP when given effective notification “of materials that they claim with valid reasons to be infringing their copyright or related rights.”⁸² This would have preserved the right of U.S. content owners to obtain the identity of a subscriber from an ISP. The issue was how those identities would be obtained. Under the DMCA, a copyright owner can obtain the identity of a subscriber from an ISP by filing a request for a subpoena with a United States district court.⁸³ For the court to grant the subpoena, the rights holder must show the same elements it does for the notice and take-down request in §512(c)(3)(A).⁸⁴ Only upon receipt of the subpoena must the ISP disclose the identity of alleged infringer.⁸⁵ However, the ACTA provision in the April draft based release of the identity of an alleged infringer simply on “effective notification” to the ISP.⁸⁶ If this standard were adopted, it would apply the notice and take-down remedy of the DMCA based on much less than the currently required court subpoena. A rights holder would be able to request removal of copyrighted material *and* the identity of the alleged infringer by arguably submitting one request to the ISP. If an ISP were required to release personal subscriber information solely based on effective notice by a content owner, the due process rights of U.S. citizens would be compromised.

ACTA also proposed an alternative, Article 2.18 Option two (3 *quater*), which encouraged “mutually supportive relationships between online service providers and right holders to deal effectively with...infringement which

authority.” See ANTI-COUNTERFEITING TRADE AGREEMENT, Jan. Draft, *supra* note 51, at Art. 2.18 (3)(b)(ii)(Option 1).

⁸⁰ Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(A)(iii) (2010).

⁸¹ *Id.* at § 512(c)(3)(A).

⁸² OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44, at Art. 2.18 (Option 2)(3*ter*).

⁸³ 17 U.S.C. § 512(h)(1).

⁸⁴ *Id.* at § 512(h)(4).

⁸⁵ *Id.* at § 512(h)(5).

⁸⁶ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44, at Art. 2.18 (Option 2)(3*ter*).

takes place by means of the Internet, including the encouragement of establishing...actions which should be taken.”⁸⁷ This option would not run afoul of U.S. due process concerns as it allows each Party to develop its own guidelines for enforcement.⁸⁸

The final text of ACTA seems to resolve this issue. It provides that the parties to ACTA may order an ISP or OSP to expeditiously disclose the identity of a subscriber whose account was used for infringement, if the rights holder has a “legally sufficient claim of infringement.”⁸⁹ This standard could arguably comport with the DMCA requirements of a subpoena and certainly require more than the previously proposed “effective notification” standard. It also appears to stop short of the “notice and take down” requirements of the DMCA, as the final Consolidated Text merely requires that parties “permit effective action against an act of...infringement...including expeditious remedies to prevent infringement.”⁹⁰ Once again, copyright owners who pushed for the adoption of the DMCA take-down provisions and a looser standard for disclosure of customer identity information must have been disappointed with the outcome of this section of the ACTA.

C. Technological Protection Measures

Digital Rights Management (DRM) uses various technologies, or Technological Protection Measures (TPMs), to control access to, and use of, digital content.⁹¹ It can include various types of technologies, such as encryption, copy generation management systems, and digital containers.⁹² These systems are integrated into consumer devices in a standardized way and sold on the mass-market. The public availability of these devices has allowed hackers to breach the TPMs and infringe upon the intellectual property contained therein.

Two international treaties address TPMs – the 1996 WIPO treaty and the 2002 WIPO Copyright Treaty (WCT), which prohibit the circumvention

⁸⁷ *Id.* at Art. 2.18 (Option 2)(3*quater*).

⁸⁸ An examination of the January 2010 leaked draft seems to indicate that the United States proposed the ISP liability standard in Option 1 described above, while Japan proposed the ISP liability standard described in Option 2(3 *ter*) and (3 *quater*). A subsequent paragraph notes that the U.S. option is not consistent with Japanese law. *See* ANTI-COUNTERFEITING TRADE AGREEMENT, Jan. Draft, *supra* note 51.

⁸⁹ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Oct. Text, *supra* note 1, at Art. 2.18(4).

⁹⁰ *Id.* at Art. 2.18(1).

⁹¹ Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 AM. J. COMP. L. 323, 326 (2004).

⁹² *Id.* at 326-27.

of technological measures used to protect copyrighted works.⁹³ Specifically, the WCT requires that signatories provide “adequate legal protection and effective legal remedies against circumvention,”⁹⁴ leaving the door open for signatory countries to fashion their own remedial schemes.⁹⁵ In contrast, the DMCA, as codified in Title 17 §1201, expands copyright law in four ways:

1. It creates a claim for unauthorized access to works of authorship;
2. It makes distributors of circumvention devices liable for the dissemination of the means to gain unauthorized access;
3. It makes distributors of circumvention devices directly liable for the dissemination of the means to make copies or to engage in communication to the public;
4. It makes disseminators of both kinds of devices liable even if some of the end users to whom the devices are distributed would employ the devices for non-infringing purposes.⁹⁶

The scheme and penalties for circumvention of TPM is much more restrictive under the DMCA than it is under the WCT. The April draft of ACTA Article 2.18(4) followed the DMCA much more closely than the WCT. It provided for civil and criminal penalties in “appropriate cases of willful conduct,”⁹⁷ while the WCT does not require criminal penalties. Much like the DMCA, it also required protection for TPMs that control access to works of authorship.⁹⁸ It also contained DMCA-like prohibitions on both the manufacture and distribution of circumvention devices.

The final ACTA text removed the provision for criminal penalties and has now adopted the WCT standard of providing “adequate legal protection and effective legal remedies.”⁹⁹ There is no longer a specific reference regarding access to works of authorship; however, the final text did maintain the DMCA-like prohibition on manufacture and distribution of circumvention devices.¹⁰⁰ There is some concern that the USTR adopted the

⁹³ *Id.* at 331.

⁹⁴ WIPO Copyright Treaty, art. 11, Dec. 20, 1996, WIPO Doc. CRNR/DC/94, http://wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

⁹⁵ See Jane Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, 29 COLUM. J.L. & ARTS 11, 20 (2005) (“Article 11 does not instruct member States regarding the nature of the sanction for violating the anti-circumvention norm.”).

⁹⁶ *Id.* at 23.

⁹⁷ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44, at Art. 2.18(4).

⁹⁸ *Id.* at Art. 2.18(4)(a). This provision is in brackets, meaning it is still under discussion.

⁹⁹ WIPO Copyright Treat, *supra* note 94.

¹⁰⁰ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44, at Art. 2.18(6).

strict TPM provisions in the DMCA, but failed to adopt any of the exceptions to the anti-circumvention provisions.¹⁰¹ The final text of ACTA does allow for appropriate limitations or exceptions and is not intended to prejudice copyright defenses under a Party's law.¹⁰² This would allow the DMCA exceptions for U.S. companies; however, it may create problems for U.S. companies if other ACTA parties have not adopted the same exceptions allowed under the DMCA. Thus, at least one group has suggested that ACTA's apparent obligation to adopt the DMCA's TPM provisions will allow the United States to achieve what it has only been able to do through bilateral free trade agreements.¹⁰³

D. *Is this ACTA Legal?*

Section 301 of the 1984 Trade & Tariff Act gives the President of the United States the authority to deal with states that fail to provide adequate and effective protection for U.S. intellectual property rights.¹⁰⁴ If a foreign country fails to provide protection for U.S. intellectual property, the President can authorize withdrawal of trade benefits or impose duties on goods.¹⁰⁵ This is likely the basis under which the USTR has proceeded with such a sweeping plurilateral trade agreement as ACTA. Professors Goldsmith and Lessig argue that ACTA should be submitted for Senate approval as a treaty, or to Congress as a "congressional-executive" agreement.¹⁰⁶ However, the Obama Administration, through the USTR, has at least suggested that it will adopt ACTA as a "sole executive agreement", which only requires presidential approval.¹⁰⁷ Since the Constitution, Article 1, §8 gives *Congress* the power to protect intellectual property and regulate foreign commerce, it seems that interpreting ACTA as a sole executive agreement exceeds Constitutional authority and precedent.

¹⁰¹ Section 1201 of the DMCA contains exceptions for encryption research, security testing, interoperability, and others. See 17 U.S.C. §1201 (d-j).

¹⁰² OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT, Apr. Draft, *supra* note 44, at Art. 2.18(8).

¹⁰³ Gwen Hinze, *Preliminary Analysis of the Officially Released ACTA Text*, ELECTRONIC FRONTIER FOUNDATION (Apr. 22, 2010), <http://www EFF.org/deeplinks/2010/04/eff-analysis-officially-released-acta-text>.

¹⁰⁴ OFFICE OF THE U.S. TRADE REP., SPECIAL 301 REPORT (2004-2006), http://ipjustice.org/USTR/USTR_Section_301_Reports.htm.

¹⁰⁵ *Id.*

¹⁰⁶ Jack Goldsmith & Lawrence Lessig, *Anti-Counterfeiting Agreement Raises Constitutional Concerns*, WASH. POST, Mar. 26, 2010, at A23.

¹⁰⁷ *Id.*

An alternative view, and perhaps the one adopted by the USTR, is that the Treaty Power¹⁰⁸ can be used to give Congress a legislative source of authority independent of its Article I powers.¹⁰⁹ Professor Dinwoodie has argued, “the Treaty Clause may offer lawmaking authority in the international arena, with local effects, in ways that do not exist under the Copyright Clause with respect to purely local regulations.”¹¹⁰ This could be a basis for giving ACTA the true force and effect of law - eventually.¹¹¹

V. CONCLUSION

One must assume that the USTR has acted in the interests of the U.S. copyright holders, making concerted attempts to move other countries toward U.S. standards of copyright infringement and enforcement. There are obvious reasons why the United States government would be interested in enforcing U.S. copyright laws. It certainly serves the interests of many U.S. companies that lose billions of dollars a year from piracy of software, copyrighted, and patented goods.¹¹² No one could question that the United States has a legitimate interest in this regard.

The strategy and best interests of the content owners can be seen in the proposed provisions of the earlier versions of ACTA. Some of these provisions included the inducement theory of secondary liability, as well as the failure to include fair use, safe harbor, and other exceptions to the criminal and civil liability sections. Still other provisions placed third party liability on ISPs to release customer identity information, remove information, and even terminate Internet access upon mere notice of infringement.

With the combined efforts of the federal government in its trade negotiations, G8 support, civil lawsuits against torrent trackers, and criminal and civil lawsuits against individual users, it may appear that the content owners are slowly winning the fight to stop internet piracy. ACTA was

¹⁰⁸ Article II, Section 2 of the Constitution gives the President the power to make treaties with the advice and consent of two-thirds of the Senate. *See*, U.S. CONST. art. II, § 2.

¹⁰⁹ Caroline Nguyen, *Note: Expansive Copyright Protection for all Time? Avoiding Article I Horizontal Limitations through the Treaty Power*, 106 COLUM. L. REV. 1079, 1111 (2006).

¹¹⁰ Graeme B. Dinwoodie, *Symposium: Constitutional Challenges to Copyright: Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*, 30 COLUM. J.L. & ARTS 355, 375 (2007).

¹¹¹ Much could be said with regard to the Treaty Power and the writings of recent scholars on its relevance to copyright law; however, such discussion is beyond the scope of this paper.

¹¹² IP theft networks have caused commercial losses of US \$500 billion. *See* Charles R. McManis, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty*, 46 HOUS. L. REV. 1235, 1245 (2009).

clearly designed to bolster the efforts of content owners by providing some level of “super-TRIPS” enforcement for copyright infringement.

However, the secretive earlier drafts of ACTA caused outrage among many public interest groups. In 2008, several public interest groups filed two separate Freedom of Information Act requests for the text of ACTA, both of which were denied by the White House. Subsequently, the Electronic Frontier Foundation and Public Knowledge filed a Freedom of Information Act lawsuit against the USTR to compel the release of the ACTA document but later dismissed the lawsuit.¹¹³ Even Senator Ron Wyden sent a letter to the USTR in January, 2010 requesting clarification on the purpose and scope of the ACTA negotiations.¹¹⁴ In addition, there have been many articles, blogs, and even a facebook page devoted to defeating ACTA.

Perhaps it was the tide of public opinion that swayed the United States to relent in its pursuit of tougher copyright enforcement provisions in ACTA. Perhaps it became clear in later negotiating rounds that all of the parties would not be able to agree on standards that exceeded the TRIPS agreement. Ultimately, it remains to be seen whether the Executive Branch intends to use its powers – like the Treaty Power – to do what content owners have been largely unable to do for years in their efforts to protect their intellectual property rights. Surely legal challenges will come if the USTR and the Executive Branch pursue the use of the Treaty Clause as an “end run” around the Constitution. The USTR may have been in the position to force U.S. copyright standards onto anyone who wants to do business with the United States – a ruthless endeavor – but for now, the final product of ACTA may end up being toothless indeed.

¹¹³ Grant Gross, *supra* note 38.

¹¹⁴ Letter from Senator Ron Wyden to US Trade Rep., Jan. 6, 2010 available at http://keionline.org/sites/default/files/Wyden_Letter_to_USTR_on_ACTA_Jan_2010.pdf.